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Convention on jurisdictional immunities of States and their property

Convention on jurisdictional immunities of States and their property

Report of the Secretary-General

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I. Introduction

1. In paragraphs 1 and 2 of its resolution 52/151, entitled "Convention on jurisdictional immunities of States and their property", the General Assembly decided to consider the item again at its fifty-third session with a view to the establishment of a working group at its fifty-fourth session, taking into account the comments submitted by States in accordance with resolution 49/61, and urged States, if they had not yet done so, to submit to the Secretary-General their comments referred to in paragraph 2 of resolution 49/61.

2. By a note dated 29 December 1997, the Secretary-General invited States to submit comments in accordance with paragraph 2 of resolution 52/151.

3. Replies received as of 28 August 1998 were included in the report of the Secretary-General contained in document A/53/274 and Add.1.

4. In paragraph 1 of its resolution 53/98, entitled "Convention on jurisdictional immunities of States and their property", the General Assembly decided to establish an open-ended working group of the Sixth Committee, open also to participation by States members of the specialized agencies, at its fifty-fourth session, to consider outstanding substantive issues related to the draft articles on jurisdictional immunities of States and their property adopted by the International Law Commission, taking into account the recent developments of State practice and legislation and any other factors related to that issue since the adoption of the draft articles, as well as the comments submitted by States in accordance with paragraph 2 of resolution 49/61 and paragraph 2 of resolution 52/151, and to consider whether there were any issues identified by the working group upon which it would be useful to seek further comments and recommendations of the Commission.

5. By a note dated 8 February 1999, the Secretary-General once again invited States to submit comments in accordance with paragraph 2 of General Assembly resolution 52/151.

6. The present report contains the replies received as at 18 August 1999. Any replies which may subsequently be received will be reproduced in an addendum to the present report.

7. The present report further supplements the replies received from States pursuant to paragraph 2 of General Assembly resolution 49/61, which are reproduced in document A/52/294.

II. Replies received from States

Lebanon

[Original: Arabic]
[21 June 1999]

Comments on the draft articles

As we have seen, the objective of the draft articles is to formulate and codify rules of international law concerning the immunity of States and their property from the jurisdiction of other States. This is a topic of great importance in view of the growing complexity of international relations and the need to maintain stable and peaceful relations among all States.

The topic of the jurisdictional immunity of States and their property before the courts of other States is not new in international law. Custom and practice have yielded rules that are followed in this field, agreements have been concluded, legislation has been enacted by some States in the matter and jurisprudence has proposed solutions that may differ from one State to another and have their own legal rationale. There is thus a pressing need to elaborate standard rules approved by all States, and this is the objective sought by the International Law Commission in the present draft articles.

With regard to the *basis for immunity*, which the draft articles do not address explicitly, it appears that, as conventionally accepted in international law, it is [derived] from principles concerning the independence, sovereignty and equality of States. Thus no State may be subject to the jurisdiction of another State that is its equal without its agreement, just as international etiquette and good relations between States require that such jurisdictional immunity, which constitutes one of the manifestations of diplomatic immunity, should be conceded.

Regard for the development of international law in the field of immunity

The draft articles [represent] a transition from absolute immunity to qualified immunity, since the former was widely criticized for sacrificing the rights of plaintiffs and being prejudicial in cases where justice was not done for reasons of general and obscure principle. The draft articles have thus used, alongside the organic criterion for immunity, an objective criterion linked not only with the person benefiting from immunity but also with the act performed by him and constituting the subject of the litigation. Cases of immunity have thus been restricted in the interests of doing justice, inasmuch as there can be no justification for ignoring it.

The nature of immunity

Immunity means that the court is incompetent to consider the dispute. But what is the distinguishing feature of such incompetence? It is incompetence of a special kind, and it differs from other cases of incompetence. It approximates absolute incompetence since the court must invoke it automatically, and it approximates relative incompetence since it can be waived. Incompetence lapses in some cases of the competence *ratione loci* of the court, as in draft articles 11, 12, 13, 15 and 18.

Does Lebanese law have any provisions concerning jurisdictional immunity? In Lebanese law, there is only the provision of article 860 of the Civil Proceedings Law to the effect that the funds of foreign States may not be seized with the exception of those involved in a transaction subject to the rules of private law. In the past, Decree No. 53/L.R., of 20 April 1938, prohibited litigation against the French State before Lebanese and Syrian courts, whether such actions were primary or contingent. The Decree was, however, repealed by the Law of 18 September 1946.

It should be noted in this regard that the Lebanese State has signed a number of economic agreements with other States that provide for international arbitration for the settlement of disputes, so that it waives jurisdictional immunity in this regard.

To revert to the provisions of the draft articles in question, we have the following comments to make:

With regard to draft article 2, on the use of terms:

The definition of "court": The draft articles use the functional and not the organic criterion, and this appears to be acceptable.

The definition of "State": Here the draft articles use a mix of the organic criterion and the objective criterion. According to the draft articles, the Lebanese State includes its various political and administrative agencies and public institutions to the extent that they perform sovereign acts, that is to say the *prérogatives de la puissance publique*, and it includes the representatives of the State to the extent they are exercising their function of representation but with regard to their person and their acts of representation.

Here it should be said that the various governmental and administrative agencies do not enjoy independent juridical personality but are included in that of the State. Constitutionally, they are directed by the ministers and are represented before national and international jurisdictions by the chief of the relevant department in the Ministry of Justice. Independent public institutions, however, do have independent juridical personality and they are represented legally by the President of the Council of Administration.

Definition of "commercial transaction": Such a transaction includes:

Any commercial contract or transaction for the sale of goods or supply of services;

Any contract for a loan or other transaction of a financial nature;

Transactions of a commercial, industrial or professional nature.

In other words, the criterion of the nature and purpose of the transaction is used.

Article 3: The privileges and immunities of diplomatic missions, consular posts, special missions, missions to international organizations, delegations to international organizations or to international conferences, and of persons connected with them, as well as the privileges accorded under international law to Heads of State *ratione personae*, are excepted from the draft articles.

This is natural, since the privileges and immunities in question are addressed in the Vienna Conventions on diplomatic and consular relations, to which Lebanon has acceded.

Articles 4, 5, 6, 7, 8 and 9 deal with the non-retroactivity of the draft articles, the limits of immunity and its automatic invocation by the court, cases where the State is regarded as a party in the action, and cases where immunity is waived when the action concerns a commercial transaction that is not between two States. No objection.

Article 11: Formulates a special rule for contracts of employment. No objection.

Article 12: Formulates a special rule for actions for criminal or quasi-criminal liability. No objection.

Article 13: Endorses competence *ratione loci* in certain cases. No objection.

Article 14: Stipulates that immunity cannot be invoked in the event of infringement of intellectual or industrial property rights. No objection.

Article 15: Provides for cases where immunity can and cannot be invoked when a State participates in companies or other collective bodies. No objection.

Article 16: Formulates special rules for immunity with regard to the operation of ships for governmental or non-governmental purposes. No objection.

Article 17: Provides for the waiver of immunity in the event of arbitration. No objection.

Articles 18 and 19: Provide for State immunity from measures of constraint and delineate its limits.

As stated above, article 860 of the Lebanese Civil Proceedings Law explicitly stipulates that the funds of foreign States may not be seized, with the exception of those involved in a transaction subject to the rules of private law. Draft article 18, however, after establishing the principle of immunity from measures of constraint, goes on to say that the State may waive such immunity. This is acceptable since such immunity was originally established in its interest.

Article 20: Formulates the principles for the service of process. No objection.

Article 21: Formulates conditions for a default judgement and its setting aside.

It should be noted here that when the jurisdictional immunity of a State is waived and the court of a foreign State has competence, that court shall apply the procedural rules in effect in its own law with due regard for the special principles for which provision is made in the draft articles.

We are of the view that it would be better for the draft articles to contain a special provision to this effect in order to avoid any confusion. The draft provides only for objection to the default judgement and does not stipulate other possible methods of appealing against a judgement in accordance with the law of the forum State. Does this mean that the judgement is not subject to such appeal? An explicit text in this regard would resolve the disparity.

Article 22: Provides for privileges and immunities during court proceedings. No objection.

Important note

The draft articles make one great omission that might cause conflict between the State proceeded against and the forum State. They stipulate the principle of jurisdictional immunity but establish numerous exceptions based on a variety of principles. Should a difference arise as to the interpretation of the provisions of the draft articles, the basic condition is that the court before which the action takes place is competent *de jure* and de facto to consider it so that it will be able to apply the basic rules to resolve the dispute. But when the dispute concerns whether or not there is immunity as between the two States, then a decision on the matter of immunity is left to the court of the State before which the proceedings are being held. Matters become complicated and the relationship between the two States becomes critical.

Accordingly:

We propose the addition of a draft article to read as follows:

Should a dispute arise between two States concerning whether or not the conditions for jurisdictional immunity have been met and that requires the interpretation of the provisions of the draft articles, the procedure shall be as follows:

1. Either of the two States may invite the other to conduct compromise negotiations in order to resolve the problem concerning competence.

2. Should six months elapse from the time of the invitation in which the negotiations fail to reach a solution, either of the two parties may approach the International Court of Justice to solve the problem concerning competence.

Qatar

[Original: Arabic]
[1 July 1999]

The draft articles on jurisdictional immunities of States and their property prepared by the International Law Commission cover a significant number of international transactions, to which Qatar considers that it is appropriate to apply international legislation, now that all parts of the world are so closely linked and their interests overlap and intertwine.

Qatar also believes that the draft articles have adequately addressed the field. However, with a view to completing the picture, we wish to comment on some specific articles, thereby allowing the Secretary-General to take these comments into consideration, pursuant to the request of the General Assembly.

Specific comments

1. Article 2 (c)

We consider that the definition of commercial transaction given in the draft article is appropriate and acceptable.

2. Article 3

Privileges and immunities not affected by the present articles

Qatar supports the response submitted by Argentina with regard to the phrase "connected with" contained in

article 3, paragraph 1 (b), and considers that, if worded as suggested by Argentina, the paragraph would be clearer. The suggested wording is as follows:

> "members of their staff and family members covered by the relevant statutes governing privileges and immunities".

Qatar considers that the formulation put forward in paragraph 20 of the Argentine response is appropriate.

3. Article 10

Commercial transactions

We consider that the title of the article is apposite, and that the non-applicability of immunity from jurisdiction to commercial transactions, with the regulations and controls specified by the draft article, is fair and logical.

4. Article 11

Contracts of employment

The provisions contained in this draft article are also consonant with the principles of justice and with the proper application of the law in such matters as are covered by the draft article. The exceptions provided for in the draft article are complementary to the draft text. However, it would appear that further clarification is needed of the non-applicability of paragraph 1 to an employee who has been recruited to perform functions closely related to the exercise of governmental authority, and that such clarification should be incorporated in the body of the text. Qatar supports the response submitted by Germany with regard to contracts of employment involving a State, and agrees that the draft texts should provide the greatest possible degree of protection for the employee.

5. Article 18

State immunity from measures of constraint

Qatar considers that the formulation of this text serves its intended purpose in this important section on proceedings before a court of another State. Furthermore, the rules laid down in the article guarantee proper application and that State consent to exercise of jurisdiction in accordance with article 7 shall not be considered as implicit consent to the taking of measures of constraint pursuant to article 18, paragraph 1. Such consent shall be considered as separate.

6. A mechanism for the settlement of disputes

Qatar considers that the draft articles should include a mechanism to which States may have recourse for the settlement of disputes over the interpretation and application of the agreement. In this regard, Qatar supports the proposal regarding such a mechanism made by Argentina in its response to the draft articles.